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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

REBECCA BUSH, etc., et al., Plaintiffs and Respondents, v. HORIZON WEST et al., Defendants and Appellants.	C067277 (Super. Ct. No. 34201000850 24CUPPOGDS)

In this action, plaintiff Rebecca Bush sued the operators of a skilled nursing facility for elder abuse (among other causes of action) based on their alleged neglect in providing her care and treatment at the facility. In the same complaint, Bush's daughter, plaintiff Charmaine Jennings, sued the same defendants for negligent infliction of emotional distress based on her alleged observation of the harm they caused Bush through their neglect. When defendants moved to compel arbitration pursuant to a written agreement with Bush, the trial court exercised its discretion under Code of Civil Procedure section 1281.2, subdivision (c) (section 1281.2(c)) to deny

their motions because of the possibility of conflicting rulings between Bush's claim for elder abuse, which was subject to arbitration, and Jennings's claim for negligent infliction of emotional distress, which was not.[1]

On defendants' appeals, we find no error in the trial court's decision. As explained more fully below, we conclude the application of section 1281.2(c) was not preempted here by the Federal Arbitration Act (the federal Act) (9 U.S.C. § 1 et. seq.), and we reject the argument that the parties agreed section 1281.2(c) would not apply. We also conclude that Jennings was not bound by the arbitration agreement either based on our Supreme Court's recent decision in *Ruiz v. Podolsky*

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[1] Section 1281.2(c) provides as follows:

"On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy, the court shall order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists, unless it determines that:

"[¶] . . . [¶]

"(c) A party to the arbitration agreement is also a party to a pending court action or special proceeding with a third party, arising out of the same transaction or series of related transactions and there is a possibility of conflicting rulings on a common issue of law or fact. For purposes of this section, a pending court action or special proceeding includes an action or proceeding initiated by the party refusing to arbitrate after the petition to compel arbitration has been filed, but on or before the date of the hearing on the petition. This subdivision shall not be applicable to an agreement to arbitrate disputes as to the professional negligence of a health care provider made pursuant to Section 1295."

(2010) 50 Cal.4th 838 or on the doctrine of equitable estoppel. Finally, we find no abuse of discretion in the trial court's determination that there was a possibility of conflicting rulings, and we decline to overturn the trial court's ruling -- in which defendants have otherwise failed to show any error -- based on "public policy."

FACTUAL AND PROCEDURAL BACKGROUND

On August 12, 2010, Bush, by and through her daughter and guardian ad litem, Jennings, commenced this action by filing a complaint containing causes of action for elder abuse, fraud, and violations of the Patients Bill of Rights (Health & Saf. Code, § 1430, subd. (b)). The complaint alleged that in April 2007, when she was 79 years old, Bush was admitted to a 24-hour skilled nursing facility -- defendant Sierra Health Care Center, Inc. (Sierra).[2] The complaint further alleged that beginning in

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[2] The complaint also named as defendants Horizon West, Inc.; Horizon West Healthcare, Inc.; Horizon West Healthcare of California, Inc.; and Golden Legacy, Inc. The complaint alleged that these defendants (which the complaint identified jointly as Horizon West) "owned, managed, controlled, maintained and/or operated" Sierra. Also named as a defendant was Lorri Ann Badten, who was allegedly Horizon West's director of operations.

In its answer to the complaint, Golden Legacy noted that it was formerly known as Horizon West, Inc. Thus, there are five defendants in this case: (1) Sierra; (2) Horizon West Healthcare; (3) Horizon West Healthcare of California; (4) Golden Legacy; and (5) Badten.

Although Golden Legacy was initially represented by the same attorneys as the other three corporate defendants, Golden Legacy later retained a separate law firm and since then has filed papers separately from the other three corporate

2008 and continuing until she left Sierra in May 2009, Bush "suffered severe, pervasive neglect and her physical and mental condition declined precipitously" because of "extreme cost-cutting measures" at the facility. The fraud cause of action was based on the allegation that the corporate defendants concealed their inability and lack of intention to provide legally adequate care to Bush.

In addition to appearing in the action as Bush's guardian ad litem, Jennings also appeared as a plaintiff in her own right, asserting a cause of action for negligent infliction of emotional distress based on allegations that she visited Bush daily and "observ[ed] the horrendous consequences of Defendants' utter neglect, indifference, and inhumane treatment toward her mother."

Defendants filed their answers to the complaint in September 2010. The following month, Bush moved for trial preference, which the court granted, ordering that trial be set on or before March 23, 2011.

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defendants, including on appeal. Meanwhile, in the trial court the other three corporate defendants filed papers separately from Badten -- up to and including their notice of appeal -- but on appeal they have filed a joint brief with Badten.

To make the appropriate distinctions between the various groupings of the defendants, we will use the term Horizon to refer jointly to the three corporate defendants other than Golden Legacy, we will use the term the corporate defendants to refer jointly to all four of the corporate defendants, and we will use the term defendants to refer jointly to all five defendants.

In December 2010, Horizon and Golden Legacy each moved to compel arbitration based on an arbitration agreement between Bush and Sierra that Jennings had signed in May 2007 as Bush's legal representative.[3] Plaintiffs opposed the motions on numerous grounds. Among other things, they argued that the court should refuse to compel arbitration under section 1281.2(c) because of the possibility of conflicting rulings on common issues of law and fact.

In January 2011, the trial court exercised its discretion under section 1281.2(c) to deny the motions to compel arbitration because of the possibility of conflicting rulings between the arbitration of Bush's claims and a trial of Jennings's claim. In the court's view, "[a]ll causes of action by both Plaintiffs are related to the Defendants' care provided to Plaintiff Bush and are premised upon similar if not identical facts. Indeed, if Bush's claims proceed to arbitration, an arbitrator could conclude that Defendants did not fail to provide adequate care and thus could deny relief. However, a trial court could find that Defendants are liable for inflicting emotional distress upon Plaintiff Jennings based on her allegations that she suffered emotional distress as a direct result of 'Defendants' neglect and maltreatment of [Bush] . . . [.]'"

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[3] Badten filed joinders in both motions.

Defendants timely appealed. (Code Civ. Proc.,[4] § 1294, subd. (a).)

DISCUSSION

Defendants offer numerous arguments as to why the trial court erred or abused its discretion in refusing to compel arbitration. We address each argument in turn.

I

Preemption

Golden Legacy contends the application of section 1281.2(c) was preempted here by the federal Act. We disagree.

"A court's order denying arbitration under section 1281.2(c) is 'ordinarily reviewed for abuse of discretion.' [Citation.] But the issue presented here--whether federal law governs the arbitration agreement--is a question of law involving interpretation of statutes and the contract (with no extrinsic evidence). We therefore apply a de novo standard of review." (*Rodriguez v. American Technologies, Inc.* (2006) 136 Cal.App.4th 1110, 1116-1117.)

The pertinent portions of the arbitration agreement are as follows:

Article I of the agreement, entitled "RECITALS," contains several relevant provisions. Consistent with section 1295, subdivision (a), which sets forth certain requirements for agreements to arbitrate medical malpractice claims, the first

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[4] All further section references will be to the Code of Civil Procedure.

paragraph of Article I (paragraph 1.1) consists of the following recital: "It is understood that any dispute as to medical malpractice, that is as to whether any medical services rendered under this contract were unnecessary or unauthorized [or] were improperly, negligently or incompetently rendered, will be determined by submission to arbitration as provided by California law, and not by a lawsuit or resort to court process except as California law provides for judicial review of arbitration proceedings. Both parties to this contract, by entering into it, are giving up their constitutional right to have any such dispute decided in a court of law before a jury, and instead are accepting the use of arbitration."

The second paragraph of Article I (paragraph 1.2) in turn provides as follows: "It is also understood that this agreement similarly governs the submission of [*sic*] arbitration of any and all other claims arising out of the provision of services by the Community,[5] the admission agreement, the validity, interpretation, construction, performance and enforcement thereof, or which allege violations of the Elder Abuse and Dependent Adult Civil Protection Act, the Unfair Competition Act, the Consumer Legal Remedies Act, or which seek an award of treble damages, punitive damages or attorneys' fees."

The fifth paragraph of Article I (paragraph 1.5) recites as follows: "As this agreement relates to the Resident's admission

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5 The agreement later defined the Community as Sierra.

in the Community, and the Community, among other things, participates in the Medicare and/or Medi-Cal programs and/or procures supplies from out-of-state vendors, the parties acknowledge and agree that Resident's admission and these other events evidence transactions affecting or involving interstate commerce governed by the Federal Arbitration Act."

The first paragraph of Article III of the agreement (paragraph 3.1), entitled "ARBITRATION OF DISPUTES," provides as follows: "The Parties hereby acknowledge that arbitration is preferable to a judicial forum and the California law favors the enforcement of valid arbitration provisions. The arbitration shall be conducted by one neutral arbitrator selected from the J.A.M. (Arbitration Service) in Davis (City), California and in accordance with discovery procedures set forth in the California Arbitration Act, California Code of Civil Procedure Section 1280 et seq. The arbitrator shall be selected from a panel of J.A.M. (Arbitration Service) arbitrators, using the process for selection employed by the J.A.M. (Arbitration Service). If the Parties are unable to select one arbitrator using such process, the arbitrator shall be selected using the provisions of the California Code of Civil Procedure Section 1281.6. In reaching a decision the arbitrator shall prepare finding[s] of fact and conclusions of law. Except as required by law, each party shall bear its own costs and fees for the arbitration."

Article V of the agreement, entitled "EXECUTION," contains two paragraphs that are largely repetitive of the first two paragraphs in Article I. Specifically, the first paragraph in

Article V (paragraph 5.1), which precedes signature lines for the resident, the resident's legal representative, and a community representative, provides as follows: "The parties to the Arbitration Agreement hereby acknowledge and agree that, upon execution, any and all disputes or claims as to medical malpractice (that is, whether any medical services rendered during the Resident's admission were necessary or unauthorized or were improperly, negligently or incompetently rendered) will be determined by submission to neutral arbitration as provided by California law, and not by a lawsuit or to court process, except as California law provides for judicial review of arbitration proceedings. Such arbitration will be governed by this Arbitration Agreement."

Similarly, the second paragraph in Article V (paragraph 5.2), which precedes a second set of signature lines for the resident, the resident's legal representative, and a community representative, provides as follows: "The parties further acknowledge and agree that any and all disputes or claims other than a claim for medical malpractice, arising out of the provision of services by the Community, the admission agreement, the validity, interpretation, construction, performance and enforcement thereof, or which allege violations of the Elder Abuse and Dependent Adult Civil Protection Act, the Unfair Competition Act, the Consumer Legal Remedies Act, or which seek an award of treble damages, punitive damages or attorneys' fees, will be determined by submission to neutral arbitration as provided by California law, and not by a lawsuit or court

process, except as California law provides for judicial review of arbitration proceedings. Such arbitration will be governed by this Arbitration Agreement."

With these provisions in mind, we turn to Golden Legacy's argument. According to Golden Legacy, because paragraph 1.5 "expressly adopts the [federal Act]," "the procedural rules of the [federal Act], not the California Arbitration Act, govern the enforcement of the Arbitration Agreement." More specifically, Golden Legacy argues that "section 1281.2(c) cannot be applied to an arbitration agreement, like the one here, that fails to expressly incorporate section 1281.2(c)."

To explain why Golden Legacy is wrong, we begin with the United States Supreme Court's decision in *Volt Info. Sciences v. Stanford Univ.* (1989) 489 U.S. 468 [103 L.Ed.2d 488] (*Volt*). There, the parties had entered into a construction contract for the installation of a system of electrical conduits on the Stanford campus. (*Id.* at p. 470 [103 L.Ed.2d at p. 494].) The contract included an arbitration provision and also "a choice-of-law clause providing that '[t]he Contract shall be governed by the law of the place where the Project is located.'" (*Ibid.*) When a dispute arose under the contract, Volt demanded arbitration, but Stanford sued. (*Id.* at pp. 470-471 [103 L.Ed.2d at pp. 494-495].) Under the authority of section 1281.2(c), the trial court denied Volt's motion to compel arbitration. (*Id.* at p. 471 [103 L.Ed.2d at p. 495].)

While the California Court of Appeal "acknowledged that the parties' contract involved interstate commerce, that the

[federal Act] governs contracts in interstate commerce, and that the [federal Act] contains no provision permitting a court to stay arbitration pending resolution of related litigation involving third parties not bound by the arbitration agreement," the appellate court nonetheless concluded that by their choice-of-law provision "the parties had incorporated the California rules of arbitration, including § 1281.2(c), into their arbitration agreement." (*Volt*, *supra*, 489 U.S. at pp. 471-472 [103 L.Ed.2d at p. 495].)

On review of the Court of Appeal's decision, the United States Supreme Court held that "where the parties have agreed that their arbitration agreement will be governed by the law of California," "application of [section 1281.2(c)] is not pre-empted by the [federal Act]." (*Volt*, *supra*, 489 U.S. at p. 470 [103 L.Ed.2d at p. 494].) The court explained that although "the [federal Act] pre-empts state laws which 'require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration,'" "it does not follow that the [federal Act] prevents the enforcement of agreements to arbitrate under different rules than those set forth in the [federal] Act itself. Indeed such a result would be quite inimical to the [federal Act's] primary purpose of ensuring that private agreements to arbitrate are enforced according to their terms. . . . Where, as here, the parties have agreed to abide by state rules of arbitration, enforcing those rules according to the terms of the agreement is fully consistent with the goals of the [federal Act], even if the

result is that arbitration is stayed where the [federal] Act would otherwise permit it to go forward." (*Id.* at pp. 478-479 [103 L.Ed.2d at p. 500].)

The United States Supreme Court's decision in *Volt* plainly defeats Golden Legacy's argument that "section 1281.2(c) cannot be applied to an arbitration agreement, like the one here, that fails to expressly incorporate section 1281.2(c)." For section 1281.2(c) to apply, it was sufficient in *Volt* that the contract generally provided that it would "'be governed by the law of the place where the Project is located,'" which was California. (*Volt*, *supra*, 489 U.S. at p. 470 [103 L.Ed.2d at p. 494].) Here, the arbitration agreement provided even more specifically that "any and all disputes or claims . . . arising out of the provision of services by the Community," including but not limited to claims "which allege violations of the Elder Abuse and Dependent Adult Civil Protection Act," "will be determined by submission to neutral arbitration *as provided by California law*." (Italics added.) Given that the parties expressly agreed that "submission to neutral arbitration" would be accomplished "as provided by California law," it is indisputable that the parties agreed to abide by those state rules of arbitration, like section 1281.2(c), that determine whether a particular dispute should be submitted to arbitration in the first place. Thus, pursuant to the Supreme Court's decision in *Volt*, the federal Act does *not* preempt the application of section 1281.2(c) in this case.

To the extent Golden Legacy contends that the provision at issue here means only that "California substantive law will be used to adjudicate disputes between the parties," we reject that contention out of hand. By its plain language, this provision specifically provides that the "submission to . . . arbitration" will be "as provided by California law." Thus, this language unequivocally invoked the procedural rules of California law governing submission of disputes to arbitration, including the rule set forth in section 1281.2(c).

The provision in paragraph 1.5 of the arbitration agreement does not alter this conclusion. At best, that provision simply acknowledges that the relationship between Bush and Sierra involved transactions "affecting or involving interstate commerce," and on that basis their agreement was subject to the federal Act. (See *Chase v. Blue Cross of California* (1996) 42 Cal.App.4th 1142, 1159 [the federal Act "covers any transaction that involves interstate commerce, whether or not the contracting parties contemplated the interstate commerce connection"].) But under *Volt*, just because their agreement was subject to the federal Act did not preclude the parties from agreeing that the submission of any claims between them to arbitration would be governed by California law, which is exactly what they agreed to.

Golden Legacy relies on the decision in *Mastrobuono v. Shearson Lehman Hutton* (1995) 514 U.S. 52 [131 L.Ed.2d 76] (*Mastrobuono*) to support its preemption argument, but that reliance is misplaced. In *Mastrobuono*, when two investors sued

the firm that had managed their investment account, the firm moved to enforce an arbitration provision in the parties' agreement. (*Id.* at p. 54 [131 L.Ed.2d at p. 82].) The agreement also contained a choice-of-law provision providing that it would be governed by the laws of the state of New York, which allow "courts, but not arbitrators, to award punitive damages." (*Id.* at p. 53 [131 L.Ed.2d at pp. 81-82].) When the arbitrators awarded punitive damages to the investors, the firm filed a motion in district court to vacate that award. (*Id.* at p. 54 [131 L.Ed.2d at p. 82].) The district court granted that motion and the federal court of appeals affirmed, concluding that because the parties had agreed the contract would be governed by New York law, they necessarily had agreed to application of the rule that arbitrators cannot award punitive damages. (*Id.* at p. 55 [131 L.Ed.2d at p. 82].)

In the United States Supreme Court, the investors asked the court "to hold that the [federal Act] pre-empts New York's prohibition against arbitral awards of punitive damages." (*Mastrobuono*, *supra*, 514 U.S. at p. 56 [131 L.Ed.2d at p. 83].) The investment firm, on the other hand, argued that by expressly incorporating New York law as the law governing their agreement, "the choice-of-law provision in their contract evidences the parties' express agreement that punitive damages should not be awarded in the arbitration of any dispute arising under their contract." (*Ibid.*) The firm argued that "the parties may themselves agree to be bound by [a rule allowing no punitive

damages in arbitration], just as they may agree to forgo arbitration altogether." (*Id.* at p. 56 [131 L.Ed.2d at p. 84].)

Although the Supreme Court ruled in favor of the investors, the court did not do so based on the argument the investors proffered -- that is, that the federal Act preempts New York's prohibition against arbitral awards of punitive damages. Instead, *as a matter of contract interpretation*, the court decided that the parties had not intended to preclude the arbitrators from awarding punitive damages, notwithstanding the choice-of-law provision incorporating New York law. (*Mastrobuono*, *supra*, 514 U.S. at pp. 58-64 [131 L.Ed.2d at pp. 84-88].) In reaching this conclusion, the court relied on a provision in the contract that provided for the arbitration to be conducted in accordance with a particular set of rules that the Supreme Court interpreted as allowing for arbitral awards of punitive damages. (*Ibid.*)

Properly understood, *Mastrobuono* is of no assistance to Golden Legacy. As we have seen, in *Mastrobuono* the Supreme Court determined from the contract that the parties had not agreed to preclude the arbitrators from awarding punitive damages. As Justice Thomas recognized in his dissent, the case "amount[ed] to nothing more than a federal court applying Illinois and New York contract law to an agreement between parties in Illinois." (*Mastrobuono*, *supra*, 514 U.S. at pp 71-72 [131 L.Ed.2d at p. 93].) Contrary to Golden Legacy's argument, *Mastrobuono* did not set forth any rule of general application that is of significance here. As we have determined already,

here the parties specifically agreed that any disputes between them would be "submi[tted] to neutral arbitration as provided by California law." As a matter of plain English, this provision encompassed the power of the court to decline to compel arbitration under the power of section 1281.2(c).

To the extent Golden Legacy relies on other state and federal court decisions to support its preemption argument, those decisions are inapposite because in none of those cases did the parties to the contract at issue expressly agree to "submission to neutral arbitration as provided by California law." (See *Rodriquez v. American Technologies, Inc.* (2006) 136 Cal.App.4th 1110, 1116 [agreement "contain[ed] no express choice-of-law provision designating California law generally"]; *Wolsey, Ltd. v. Foodmaker, Inc.* (9th Cir. 1998) 144 F.3d 1205, 1209 [agreement provided only that it was to be "'interpreted and construed under the laws of the State of California'"]; *Biomagic, Inc. v. Dutch Brothers Enterprises, LLC* (C.D. 2010) 729 F.Supp.2d 1140, 1143 [agreement provided that it "'shall be construed, and the legal relations between the parties hereto shall be determined, in accordance with the law of the State of California'"].)

For the foregoing reasons, we reject Golden Legacy's argument that the application of section 1281.2(c) was preempted by the federal Act.

II

Exemption For Arbitration Of Medical Malpractice Claims

The last sentence of section 1281.2(c) provides that "[t]his subdivision shall not be applicable to an agreement to arbitrate disputes as to the professional negligence of a health care provider made pursuant to Section 1295." Relying on this provision, Golden Legacy argues that by the terms of their arbitration agreement "the parties agreed that section 1281.2(c) would not apply to claims regarding medical malpractice *and* claims other than medical malpractice." (Italics added.) According to Golden Legacy, because the arbitration agreement "was evidently 'made pursuant to Section 1295,'" section 1281.2(c) "simply cannot be applied to the parties' . . . Agreement" -- even as to claims other than those for medical malpractice.

We disagree. "The purpose of section 1295 is to encourage and facilitate arbitration of medical malpractice disputes. . . . [¶] To ensure that a patient understands that he or she is giving up his [or her] right to have a malpractice claim tried in court, section 1295 requires uniform language for arbitration agreements in medical services contracts." (*Reigelsperger v. Siller* (2007) 40 Cal.4th 574, 578.)

Golden Legacy is correct that the arbitration agreement between Sierra and Bush was drafted in compliance with section 1295, because it contains the required uniform language in the proper places. Golden Legacy is also correct that, based on that compliance, section 1281.2(c) would not apply to any

request to arbitrate a dispute between the parties regarding medical malpractice. Here, however, Bush and Jennings have not asserted any claims for medical malpractice. Where Golden Legacy goes astray in its argument is in its assertion that the bar on applying section 1281.2(c) extends to claims between the parties *other* than those for medical malpractice, where, as here, a claim for medical malpractice has not been asserted.[6]

In effect, the parties' arbitration agreement has two aspects. In its first aspect, the agreement is an agreement to arbitrate medical malpractice claims. Paragraphs 1.1 and 5.1, which contain the uniform language required by section 1295, focus on this aspect of the agreement. In its second aspect, the agreement is an agreement to arbitrate all other claims as well. Paragraphs 1.2 and 5.2 focus on this aspect of the agreement.

By its plain terms, the last sentence of section 1281.2(c) applies to the first aspect of the parties' agreement -- that is, the agreement to arbitrate medical malpractice claims -- but it has no bearing on the second aspect of the agreement when no party has asserted a claim for medical malpractice. In other words, just because the parties include in a comprehensive arbitration agreement the language required by section 1295 to cover arbitration of medical malpractice claims does not mean

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[6] We express no opinion as to the import of the last sentence of section 1281.2(c) in a case where the plaintiff asserts a claim for medical malpractice along with other claims.

that the last sentence of section 1281.2(c) applies to claims other than those for medical malpractice when the case does not include a medical malpractice claim.

Where, as here, the parties have agreed that all disputes between them will be "determined by submission to neutral arbitration as governed by California law," and their agreement contains the uniform language required by section 1295, but the case does not involve a medical malpractice claim, then section 1281.2(c) remains applicable -- unless, of course, the parties specify otherwise. Here, they did not do so. Accordingly, we reject this argument by Golden Legacy also.

III

Jennings As A Third Party To The Arbitration Agreement

For section 1281.2(c) to apply, "[a] party to the arbitration agreement" must also be "a party to a pending court action or special proceeding *with a third party*, arising out of the same transaction or series of related transactions" and there must be "a possibility of conflicting rulings on a common issue of law or fact." (§ 1281.2(c), italics added.) For purposes of section 1281.2(c), a third party is a party who is not bound by the arbitration agreement. (See, e.g., *RN Solution, Inc. v. Catholic Healthcare West* (2008) 165 Cal.App.4th 1511, 1521.)

Defendants argue that the trial court erred in determining Jennings was a third party to the arbitration agreement between Sierra and Bush. This argument has two aspects, which we address in turn.

A

Ruiz v. Podolsky

Horizon and Badten argue first that "Jennings is equitably held subject to the arbitration agreement, because there is a sufficient identity of parties." In particular, they focus on the fact that Jennings: (1) is Bush's daughter, (2) is also her designated agent to make health care decisions, and (3) acted as Bush's legal representative for purposes of entering into the arbitration agreement with Sierra. In support of this argument, Horizon and Badten cite our Supreme Court's recent decision in *Ruiz v. Podolsky* (2010) 50 Cal.4th 838. Golden Legacy likewise relies on *Ruiz* to argue that Jennings is bound by the arbitration agreement.

Ruiz expressly involved the following issue: "when a person seeking medical care contracts with a health care provider to resolve all medical malpractice claims through arbitration, does that agreement apply to the resolution of wrongful death claims, when the claimants are not themselves signatory to the arbitration agreement?" (*Ruiz v. Podolsky*, *supra*, 50 Cal.4th at p. 841.) The Supreme Court held that "all wrongful death claimants are bound by arbitration agreements entered into pursuant to section 1295, at least when, as here, the language of the agreement manifests an intent to bind these claimants. This holding carries out the intent of the Legislature that enacted section 1295 and related statutes." (*Ibid.*)

Without delving into the *Ruiz* opinion further, it is apparent that the Supreme Court's holding there does not apply here because this case does not involve a wrongful death claim by Jennings predicated on medical malpractice, but instead involves a claim of negligent infliction of emotional distress predicated on alleged elder abuse. Apparently recognizing this problem, Horizon and Badten devote only a paragraph to this particular argument, making no attempt to explain how the decision in *Ruiz* can be read to apply to the facts before us. Golden Legacy, on the other hand, devotes eight pages to arguing that *Ruiz* governs here. Having considered that argument, however, we find no merit in it.

The arbitration agreement in *Ruiz*, signed by the patient and the defendant surgeon, "provided for the arbitration of any malpractice claims, consistent with the language of section 1295 . . . . The agreement further provided that it was the intention of the parties 'that this agreement binds all parties whose claims may arise out of or relate to treatment or service provided by the physician including any spouse or heirs of the patient and any children, whether born or unborn, at the time of the occurrence giving rise to the claim.' Elsewhere the agreement specifically provided for arbitration of wrongful death and loss of consortium claims." (*Ruiz v. Podolsky*, *supra*, 50 Cal.4th at pp. 841-842.) After the patient died, the patient's wife and four children sued the surgeon for medical malpractice and wrongful death. (*Id.* at p. 842.) The trial court granted the surgeon's petition to compel arbitration of

the claims asserted by the patient's wife, but refused to compel arbitration of the children's claims. (*Ibid.*) The Court of Appeal agreed. (*Ibid.*)

On review, the California Supreme Court began by noting that "the case requires us in some sense to reconcile the special health care arbitration statute with the wrongful death statute." (*Ruiz v. Podolsky*, *supra*, 50 Cal.4th at p. 842.) The court went on to explain, among other things, that "section 1295, subdivision (a) contemplates arbitration agreements to resolve disputes concerning 'professional negligence,'" and "'[p]rofessional negligence' is defined in section 1295, subdivision (g)(2) as 'a negligent act or omission to act by a health care provider in the rendering of professional services, which act or omission is the proximate cause of a personal injury or *wrongful death*.'" (*Id.* at p. 844.) After surveying the extant case law, the court concluded that they were "persuaded that section 1295, construed in light of its purpose, is designed to permit patients who sign arbitration agreements to bind their heirs in wrongful death actions." (*Ruiz*, at p. 849.)

Golden Legacy contends *Ruiz* should be read to hold "that section 1295, when construed in light of its purpose, is designed to permit patients who sign arbitration agreements to bind their heirs in *actions for personal injuries*, such as Jennings'[s] [negligent infliction of emotional distress] claim." (Italics added.) We find at least two flaws in that argument. First, section 1295 has no bearing here because, as

we have explained, *no one* -- that is, neither Bush nor Jennings -- has asserted any claim against defendants for medical malpractice. The fact that the arbitration agreement was drafted to comply with that statute does not somehow make that statute applicable in a case like this where medical malpractice is not asserted. As we explained in the previous section, section 1295 encourages the arbitration of medical malpractice disputes and does not apply where no such claim is asserted.

Second, *Ruiz* dealt specifically with whether a *wrongful death claim* brought by the patient's heirs was subject to an arbitration agreement between the patient and the surgeon where the agreement specifically provided that it applied to wrongful death claims and in light of the fact that section 1295 specifically encompasses wrongful death claims. In the end, all the Supreme Court held was that, under those circumstances, the arbitration agreement could be enforced, and "a contrary holding would defeat [the surgeon's] reasonable contractual expectations." (*Ruiz v. Podolsky*, *supra*, 50 Cal.4th at p. 854.)

Here, it is true the arbitration agreement specifically provides that it binds "the parties hereto, including the heirs, representative, executors, administrators, successors, and assigns of such parties." But in bringing her claim for negligent infliction of emotional distress, Jennings is not acting as a representative or heir of Bush; she is acting for herself, pursuing her own claim based on the emotional distress she allegedly sustained as a consequence of witnessing the injury to her mother caused by defendants' alleged misconduct.

Nothing in section 1295 nor the arbitration agreement here compels the conclusion that the Supreme Court's decision in *Ruiz* applies to a case like this, where neither medical malpractice nor wrongful death is at issue. Accordingly, we reject defendants' arguments that Jennings was not a third party to the arbitration agreement under *Ruiz*.

B

Equitable Estoppel

The second aspect of defendants' argument that Jennings is not a third party to the arbitration agreement rests on the doctrine of equitable estoppel. Specifically, Golden Legacy contends "[t]he nature of Jennings' relationship with Bush, and the nature of Jennings' claims both warrant the application of equitable estoppel in this case." For their part, Horizon and Badten argue that "Jennings should be equitably estopped, at the very least, from preventing her mother's arbitration, and should further be equitably compelled to arbitrate her own tag-along claim of [negligent infliction of emotional distress]." (GAOB 14) As we will explain, however, the doctrine of equitable estoppel has no application here.

"'Generally speaking, one must be a party to an arbitration agreement to be bound by it or invoke it.' [Citations.] 'There are exceptions to the general rule that a nonsignatory to an agreement cannot be compelled to arbitrate and cannot invoke an agreement to arbitrate, without being a party to the arbitration agreement.' [Citations.] [¶] One pertinent exception is based on the doctrine of equitable estoppel." (*JSM Tuscany, LLC v.*

Superior Court (2011) 193 Cal.App.4th 1222, 1236-1237.) Under that doctrine, "[w]hen a plaintiff brings a claim which *relies on contract terms* against a defendant, the plaintiff may be equitably estopped from repudiating the arbitration clause contained in that agreement." (*Id.* at p. 1239.) Under such circumstances, equitable estoppel is "equally applicable to a nonsignatory plaintiff" because "[w]hen that plaintiff is suing on a contract--on the basis that, even though the plaintiff was not a party to the contract, the plaintiff is nonetheless entitled to recover for its breach, the plaintiff should be equitably estopped from repudiating the contract's arbitration clause. [Citations.] [¶] This is particularly true where . . . all of the plaintiffs, signatory and nonsignatory, are related entities. A nonsignatory can be compelled to arbitrate when a preexisting relationship existed between the nonsignatory and one of the parties to the arbitration agreement, making it equitable to compel the nonsignatory to arbitrate as well. [Citation.] Additionally, a nonsignatory can be compelled to arbitrate when it is suing as a third-party beneficiary of the contract containing the arbitration clause . . . ." (*Id.* at pp. 1239-1240.)

Under the reasoning of the court in *JSM Tuscany*, equitable estoppel applies to prevent a nonsignatory plaintiff from avoiding arbitration because it would be unfair to allow the third party plaintiff to sue for breach of a contract that includes an arbitration provision but at the same time avoid the obligation of the arbitration provision. That reasoning does

not apply here because Jennings is not suing defendants for the breach of an agreement that includes an arbitration provision; she is suing them for negligently causing her emotional distress. It is true that the actions that allegedly caused Jennings emotional distress were actions defendants undertook in providing services to Bush, and Bush entered into an arbitration agreement with Sierra that covered any of *Bush's* claims arising out of the provision of those services. That does not provide a basis, however, for concluding that Jennings is equitably bound by the arbitration agreement that Bush entered into. Jennings's right to seek recovery in tort for the emotional distress she allegedly suffered as a result of witnessing defendants' deficient care of Bush is independent of the contract under which defendants provided those services to Bush and of the arbitration agreement Bush entered into with Sierra relating to those services.

It also makes no difference that Jennings was the legal representative of Bush who signed the arbitration agreement with Sierra on Bush's behalf. There is nothing to indicate Jennings was acting in any capacity other than as Bush's representative when she did so, and thus while her signature may have bound *Bush*, there is no basis -- equitable or otherwise -- for concluding that it bound *Jennings* in her own individual capacity.

To the extent Golden Legacy relies on *NORCAL Mutual Ins. Co. v. Newton* (2000) 84 Cal.App.4th 64 to support its equitable estoppel argument, that reliance is misplaced. Contrary to

Golden Legacy's argument, the court in *NORCAL* did not apply equitable estoppel to the nonsignatory party there just because she had "an agency or similar relationship [with] one of the parties to the arbitration agreement." Instead, the court concluded the nonsignatory party was bound by the arbitration agreement in the medical malpractice insurance policy that covered her late husband (a psychiatrist) because she "sought the benefits of the insurance policy by tendering defense of [a] complaint [against her and her husband] to NORCAL and accepted those benefits by allowing NORCAL to assume the cost of her defense and, together with [her husband], requesting and participating in NORCAL's settlement of the complaint." (*Id.* at pp. 66, 78.) Essentially, because she accepted the benefits of the insurance policy, even though she was not a party to it, she was equitably bound by the arbitration agreement that was part of the policy. That reasoning has no application here, however, because Jennings did nothing to accept the benefits of any agreement between Bush and defendants, let alone specifically the arbitration agreement between Bush and Sierra.

To the extent Golden Legacy argues that Jennings's "close familial relationship alone is sufficient to apply the doctrine of equitable estoppel here," that argument is likewise without merit. Golden Legacy cites two cases in support this argument -- *Ruiz* and *Herbert v. Superior Court* (1995) 169 Cal.App.3d 718. We have explained already why *Ruiz* does not apply here. As for *Herbert*, the court in that case simply reached the same result

that our Supreme Court reached 15 years later in *Ruiz*. (*Herbert*, at pp. 726-727.) In other words, both *Ruiz* and *Herbert* apply only to a claim for wrongful death brought by a patient's heirs based on medical malpractice; neither case stands for the proposition that a nonsignatory plaintiff can be required to arbitrate a claim for negligent infliction of emotional distress premised on alleged elder abuse just because of the "close familial relationship" the nonsignatory plaintiff shares with the person who was the subject of the alleged abuse.

To the extent Golden Legacy argues that "[t]he doctrine of equitable estoppel should . . . be applied to bind Jennings to the Arbitration Agreement because her [negligent infliction of emotional distress] claim is based on the same facts and circumstances and is otherwise 'intimately intertwined' with Bush's claims," we reject that argument as well. In none of the cases Golden Legacy cites in support of this argument did the courts apply the doctrine of equitable estoppel for the benefit of a signatory defendant against a nonsignatory plaintiff just because the claims of the nonsignatory plaintiff were "'intertwined'" with those of a signatory plaintiff. Rather, the pertinent portions of the cases Golden Legacy cites in support of this argument each spoke to the situation -- not present here -- where a nonsignatory *defendant* seeks to invoke an arbitration clause to compel a signatory *plaintiff* to arbitrate its claims. (See *JSM Tuscany, LLC v. Superior Court*, *supra*, 193 Cal.App.4th at p. 1237; *Boucher v. Alliance Title Co., Inc.* (2005) 127 Cal.App.4th 262, 271; *Goldman v. KPMG, LLP*

(2009) 173 Cal.App.4th 209, 220.) As the court explained in *Goldman*, "if a plaintiff relies on the terms of an agreement to assert his or her claims against a nonsignatory defendant, the plaintiff may be equitably estopped from repudiating the arbitration clause of that very agreement. In other words, a signatory to an agreement with an arbitration clause cannot '"have it both ways"'; the signatory 'cannot, on the one hand, seek to hold the non-signatory liable pursuant to duties imposed by the agreement, which contains an arbitration provision, but, on the other hand, deny arbitration's applicability because the defendant is a non-signatory.'" (*Goldman*, at p. 220.) Obviously, this rule has no application here, where a signatory defendant (Sierra) is seeking to enforce an arbitration agreement against a nonsignatory plaintiff (Jennings).

In summary, defendants have failed to show that the doctrine of equitable estoppel bars Jennings from claiming to be a third party with respect to the arbitration agreement at issue here.

IV

Possibility Of Conflicting Rulings

Horizon and Badten contend "the trial court abused its discretion in denying arbitration under section 1281.2(c) based on the possibility of conflicting rulings" because "Jennings'[s] cause of action for [negligent infliction of emotional distress] has entirely distinct elements from Bush's action for elder abuse" and therefore "there is no inconsistency in different outcomes on those claims." Again, we are not persuaded.

As we have noted, in exercising its discretion to deny arbitration under section 1281.2(c), the trial court concluded that "if Bush's claims proceed to arbitration, an arbitrator could conclude that Defendants did not fail to provide adequate care and thus could deny relief. However, a trial court could find that Defendants are liable for inflicting emotional distress upon Plaintiff Jennings based on her allegations that she suffered emotional distress as a direct result of 'Defendants' neglect and maltreatment of [Bush] . . . [.]'" Horizon and Badten challenge this conclusion on the basis that, to prevail on her claim for elder abuse, Bush will have to prove "reckless neglect" by clear and convincing evidence, while to prevail on her claim for negligent infliction of emotional distress, Jennings will have to prove mere "negligence" by a mere preponderance of the evidence. According to Horizon and Badten, given these differences, "[i]t is perfectly possible that a jury could conclude that Bush did not suffer elder abuse, but that Jennings meets the lesser, separate requirements for her bystander claim. These findings would not be inconsistent."

The fact that Horizon and Badten can envision a situation in which the findings in the two proceedings that would occur if defendants' motions to compel arbitration were granted -- arbitration for Bush and a trial for Jennings -- would not be inconsistent with each other does not mean the trial court abused its discretion under section 1281.2(c) in denying arbitration. This is so because under that statute the court can deny arbitration as long as it determines "there is a

possibility of conflicting rulings on a common issue of law or fact." Thus, to show an abuse of discretion, Horizon and Badten would have to persuade us that there *is no possibility* of conflicting rulings in the two proceedings. They have not done that.

While it is true that, to recover the enhanced remedies provided for an elder abuse claim under the Elder Abuse and Dependent Adult Civil Protection Act (Welf. & Inst. Code, § 15600 et seq.), Bush will have to prove not only abuse but also "recklessness, oppression, fraud, or malice in the commission of this abuse" (Welf. & Inst. Code, § 15657), it is also true that to prove abuse, Bush will have to prove "neglect," which is defined as "[t]he negligent failure of any person having the care or custody of an elder or a dependent adult to exercise that degree of care that a reasonable person in a like position would exercise" (*id.*, § 15610.57, subd. (a)(1)). Meanwhile, to recover on her claim for negligent infliction of emotional distress, Jennings will have to prove (among other things) that she suffered "'emotional distress caused by observing the negligently inflicted injury of a third person'" (*Bird v. Saenz* (2002) 28 Cal.4th 910, 915) -- namely, Bush. Much as the trial court concluded, it is possible that an arbitrator deciding Bush's claims could find that defendants did not negligently fail to provide reasonable care for her while a jury deciding Jennings's claims could find that defendants negligently inflicted injury on Bush by the care they provided. Because such factual findings would be conflicting, the

condition for invoking section 1281.2(c) was present here, and Horizon and Badten have failed to show any abuse of discretion in the trial court's use of the power granted by that statute.

V

Public Policy

Finally, Horizon and Badten argue that "[p]ublic policy strongly supports the enforcement of the arbitration agreement in this case." What they fail to do, however, is to show us any authority under which we can decide that the trial court should not have exercised the power granted to it under section 1281.2(c) just because we might believe that the exercise of that power contravenes our notion of good public policy. We are bound by the public policy of the state as expressed by the Legislature in its legislative enactments (as approved by the Governor), and here those enactments gave the trial court the right to decide, in the exercise of its sound discretion, whether arbitration should be denied because of the possibility of conflicting rulings if Bush were required to arbitrate while Jennings litigated in court. If Horizon and Badten believe the trial court should not have had that discretion under the circumstances of this case, then in contracting with Bush for arbitration Sierra should have made clear that section 1281.2(c) would not apply to any claims between the parties, including claims other than for medical malpractice. Sierra did not do so, however, perhaps because it saw some potential advantage for itself in preserving the right to avoid arbitration under the statute. Whatever the case may be, we cannot overrule the trial

court on public policy grounds. Having concluded that section 1281.2(c) applied here, and having concluded that the trial court did not abuse its discretion in exercising its power under the statute, we can do no more.

DISPOSITION

The orders denying the motions to compel arbitration are affirmed. Plaintiffs shall recover their costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1).)

ROBIE, J.

We concur:

RAYE, P. J.

MAURO, J.